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May 18, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 4, 2004

Case No.: TIA-0309

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits based on the employment of her late husband (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker did not have an illness related to work at the DOE. The OWA accepted the Panel's determination. The Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have determined that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an

application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed at the DOE's Oak Ridge Y-12 plant from 1971 to 1992. He worked as a process operator for one year and a garage mechanic for the others. The Applicant filed Subpart B and Subpart D applications, claiming that the Worker's cancer of the epiglottis was related to toxic exposures at DOE. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. The Applicant elected to have her Subpart D application referred to the Physician Panel without awaiting the results of the dose reconstruction.

The Physician Panel issued a negative determination. The Panel found that the Worker was exposed to asbestos, solvents, and radiation at "less than background" levels. The Panel noted a possibly weak association between asbestos exposure and radiation exposure, and laryngeal cancer. Accordingly, the Panel found that exposures at DOE were not a significant factor in the Worker's illness. The Panel stated it was "more likely than not" that the Worker's illness was related to a 50 year smoking history.

The Applicant filed an appeal. The Applicant states that the Worker smoked for over 40 years, but argues that his smoking was

not "necessarily" the cause of his cancer. She argues that the Worker had significant radiation exposure.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's arguments do not indicate Panel error. The Panel is not required to determine what "necessarily" caused a claimed illness. Instead, the Panel is required to consider whether it is at least as likely as not that exposure to a toxic substance at DOE was a "significant factor" in the illness. In this case, the Panel acknowledged only a weak association between two substances, asbestos and radiation, and the Worker's illness. Although the Applicant argues that the Worker received significant radiation exposure, the Applicant does not disagree with the Panel's description of the Worker's documented radiation exposure. Accordingly, the Applicant appears to believe that the Worker had undocumented exposures. The possibility of undocumented exposures does not indicate Panel error. We note that, at the time the case went to the Panel, NIOSH was undertaking a radiation dose reconstruction. If the dose reconstruction supports her claim, the Applicant should raise the matter with the DOL.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's grant of this appeal does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0309, be, and hereby is, denied.
- (2) The denial pertains only to the DOE appeal and not to the DOL's review of these claims under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 18, 2005